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serve medium and large . . . commercial customers” and give it “incentives to expand our . . . base footprint of optical networks to serve the medium and large business services marketplace.”⁵⁵ Charter plans to invest \$2.5 billion into serving commercial areas within its footprint if the merger is approved.⁵⁶ But Charter is not waiting for approval before expanding its business offerings. In the second quarter of 2015 alone, Charter added 31,000 commercial primary service units, a significant increase over the 19,000 added in the second quarter of 2014, and its second-quarter commercial revenue grew by 14 percent from 2014 to 2015.⁵⁷ Charter had more than 10,000 fiber-lit buildings in early 2014; it currently claims to have “12,000+ fiber lit buildings and 3,800 lit cell towers” and “44,000+ near net buildings.”⁵⁸ As a result of this investment, “business services has been one of the fastest growing areas within Charter,” with year-over-year revenue growth averaging just under 20 percent.⁵⁹

Charter’s current proposed transaction partner, TWC, likewise has enjoyed ongoing success in connection with enterprise services. TWC proclaims itself to be “the largest multi-

⁵⁵ Thomson Reuters StreetEvents, *CHTR – Charter Announces Transactions with Time Warner Cable and Bright House Networks M&A Call*, Edited Transcript, at 3 (May 26, 2015), <http://ir.charter.com/mobile.view?c=112298&v=202&d=3&id=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueGlsP2lwYWdlPTEwMjk5NTYyJkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVEIPTl9FTIRJUkUmc3Vic2lkPTU3>.

⁵⁶ The Street, *Charter Communications (CHTR) Earnings Report: Q2 2015 Conference Call Transcript* at 4 (Aug. 4, 2015), <http://s.t.st/media/xtranscript/2015/Q3/13243727.pdf>.

⁵⁷ *Id.* at 5. In the first quarter of 2015, Charter added 21,000 commercial primary service units. Kamran Asaf, *Cable Commercial Revenue Growth Continues Hot Streak in Q1*, SNL Kagan Multichannel Market Trends, at 2 (June 10, 2015) (“*Q1 Growth Report*”).

⁵⁸ Charter, Spectrum Business, *Carrier Solutions*, <https://business.spectrum.com/content/carrier> (last visited Dec. 17, 2015).

⁵⁹ Charter-TWC Public Interest Statement at 18 (June 25, 2015).

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system operator provider of Ethernet services.”⁶⁰ TWC recently stated in response to information requests in the Charter transaction that “[t]he business services segment has been and continues to be an important strategic priority and growth area for TWC,” and that it offers an array of services to the enterprise segment (defined as customers with more than 500 employees, often across multiple sites).⁶¹ Specifically, TWC has reported that it has over 850,000 buildings on its network,⁶² including 58,000 lit by its fiber network,⁶³ and its business division serves about 718,000 business customers.⁶⁴ TWC continues to grow this segment – it added 32,000 commercial buildings to its network in the first half of 2015 and considers the

⁶⁰ *Id.* at 12.

⁶¹ TWC Response to the Information and Data Requests Issued on Sept. 21, 2015 by the FCC, at 1-2, attached to Letter from Matthew A. Brill, Counsel for TWC, to Marlene H. Dortch, Sec’y, FCC, MB Docket No. 15-149 (Nov. 19, 2015) (“TWC 11/19/15 Response”).

⁶² Verizon, Profiles of Selected Competitive Enterprise Broadband Providers at 4 & n.30, filed as an Appendix to Letter from Curtis L. Groves, Asst. Gen. Counsel, Fed. Reg. Affairs and Legal Affairs, Verizon, to Marlene H. Dortch, Sec’y, FCC, WC Docket No. 05-25, RM-10593 (Sep. 24, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001325010> (“Profiles”) (citing Time Warner Cable Inc. at Morgan Stanley Technology, Media & Telecom Conference – Final, FD (Fair Disclosure) Wire, Transcript 030514a5305838.738 (Mar. 5, 2014) (statement by Time Warner Cable Inc. EVP and CFO Artie Minson)).

⁶³ Sean Buckley, *U.S. Fiber Penetration Reaches 39.3% of Buildings, Says VSG*, Fierce Telecom (Apr. 14, 2014), <http://www.fiercetelecom.com/story/us-fiber-penetration-reaches-393-percent-buildings-says-vsg/2014-04-04> (“Fiber Penetration Report”).

⁶⁴ Time Warner Cable Inc., Quarterly Report (SEC Form 10-Q), at 3 (filed July 30, 2015), <https://www.sec.gov/Archives/edgar/data/1377013/000119312515269291/d146752d10q.htm>

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addition of commercial buildings and cell tower locations to its network to be “fundamentally important” to its growth strategy.⁶⁵

Other cable operators are following suit. For example, Cox Communications (“Cox”) is seeking to expand its last-mile service to cell towers, small cells, schools, and mid-sized to large local businesses within its cable footprint.⁶⁶ In early 2014, Cox was reported to have “a mix of 28,000 fiber lit buildings, 400,000 fiber near-net buildings, and over 300,000 HFC serviceable buildings.”⁶⁷ Meanwhile, Cablevision’s Lightpath unit serves some 7,400 buildings on-net, with a “nearly ubiquitous footprint” in the New York metropolitan area,⁶⁸ and is poised to enjoy even greater scale and financial backing if the Commission approves its acquisition by Altice N.V.⁶⁹

⁶⁵ Kamran Asaf, *Cable Commercial Segment Sustains Momentum in Q2*, SNL Kagan Multichannel Market Trends, at 1 (Oct. 2, 2015) (“*Q2 Growth Report*”); see also TWC 11/19/15 Response at 3; Charter-TWC Public Interest Statement at 11.

⁶⁶ Carol Wilson, *Cox Biz Looks Beyond SMBs*, Light Reading, (Dec. 4, 2014), <http://www.lightreading.com/cable-video/cable-business-services/cox-biz-looks-beyond-smbs/d/d-id/712419>.

⁶⁷ *Fiber Penetration Report*.

⁶⁸ Cablevision Systems Corp., Annual Report (SEC Form 10-K), at 6 (filed Feb. 25, 2015), <http://www.sec.gov/Archives/edgar/data/784681/000162828015001010/cvc-12312014x10k.htm>; Profiles at 10 & nn.85-86 (Q1 2014 Cablevision Systems Corp Earnings Call – Final, FD (Fair Disclosure) Wire, Transcript 022515a5609074.774 (Feb. 25, 2015) (statement by Cablevision Systems Corporation Vice Chairman and CEO Gregg Seibert)).

⁶⁹ See, e.g., *Application of Altice N.V., Transferee, and Cablevision Systems Corp., Transferor, Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Domestic and International Section 214 Authorizations*, WC Docket No. 15-257, at 6 (filed Oct. 14, 2015) (“Cablevision subscribers, in turn, will benefit from Altice’s global scale, access to capital, and fresh perspective, all of which will be brought to bear in Cablevision’s already fierce daily contest against much larger rivals such as Verizon, AT&T/DIRECTV, and DISH in the New York Metro area, the nation’s most competitive market.”).

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Cable companies have been able to make major strides by relying on inter-company agreements to expand and enhance their reach. Coincident with its announcement noted above, Comcast stated that it had entered into wholesale agreements that would allow it to provide services to businesses outside of its traditional footprint, using the facilities of Cox, TWC, Charter, Cablevision, and Mediacom.⁷⁰ Such carrier agreements are common among cable companies. Charter, for instance, has explained that it employs such agreements as a “relatively routine matter” in order “to provide business services to larger enterprise customers,” and has been a party to a national account agreement with Comcast since November 2014.⁷¹ Moreover, CLECs can use their backbone networks to stitch together the franchise areas of individual cable companies to offer seamless Ethernet services to locations across the country.⁷²

In the aggregate, these efforts by cable companies have propelled that industry’s growth in commercial services sales. The third quarter of 2014 was the sixth consecutive quarter in which commercial service revenues grew more than 4 percent.⁷³ In 2015, an SNL Kagan analyst estimated the 2014 annual growth rate in commercial service revenue for the cable industry as a whole to be 25 percent.⁷⁴ In contrast, the RBOCs’ 2014 commercial service revenue was *down*

⁷⁰ Shalini Ramachandran, *Comcast to Sell Data Services to Big Firms Nationwide*, WALL ST. J., Sept. 16, 2015.

⁷¹ Charter Response at 129-30 (response to Request 22).

⁷² See Stewart Decl. ¶ 6.

⁷³ Kamran Asaf, *Commercial Services Revenue Clocks over 4% Quarterly Growth for 6th Consecutive Period*, SNL Kagan Multichannel Market Trends, at 1 (Dec. 5, 2014).

⁷⁴ Ian Olgeirson, SNL Kagan Multichannel Market Trends, *Cable Commercial Services Produce Mid-Market Gains, Forecast Points to slowing on Low End*, SNL Kagan Multichannel Market Trends, at 1, 2 (Mar. 19, 2015).

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2.7 percent.⁷⁵ Since the 2014 report, the growth trend for cable industry commercial revenue has continued. Cable commercial service revenue grew 18 percent year-over-year in the first quarter of 2015,⁷⁶ and 17 percent in the second quarter.⁷⁷ Comcast leads the cable industry in year-over-year commercial revenue growth, with 21.5 percent in the first quarter, 20.3 percent in the second quarter, and 19.5 percent in the third quarter, for a total growth of 20.4 percent in 2015 over the first three quarters of 2014.⁷⁸

New data reinforcing these trends is emerging all the time. For instance, just last month, SNL Kagan reported that Charter and TWC had added 31,000 and 18,000 commercial buildings to their networks, respectively, in the third quarter of 2015 alone.⁷⁹ As a result of such expansion, the cable industry's overall commercial revenues in the third quarter of 2015 grew 16.1 percent over the third quarter of 2014.⁸⁰

⁷⁵ Chris Young, SNL Kagan Multichannel Market Trends, *Telco Commercial Revenue Declines, Competition for Cable Business Heats Up*, at 1 (Mar. 25, 2015).

⁷⁶ *Q1 Growth Report* at 1.

⁷⁷ *Id.*

⁷⁸ *Id.*; *Q2 Growth Report*; Press Release, Comcast, *Comcast Reports 3rd Quarter 2015 Results* at 1, 3 (Oct. 27, 2015), http://files.shareholder.com/downloads/CMCSA/1147612904x0x856642/C83D4F35-35F2-446F-B005-5E309CDD97E4/3Q15_Earnings_Release_with_Tables.pdf. In contrast, CenturyLink reported in August 2015 that its business segment revenues in the second quarter of 2015 had declined "\$81 million, or 14%," year-over-year. The Street, *CenturyLink (CTL) Earnings Report: Q2 2015 Conference Call Transcript* at 6 (Aug. 5, 2015).

⁷⁹ Kamran Asaf, *MSOs Targeting Enterprises as Q3 Commercial Revenues Jump 16% YOY*, SNL Kagan Multichannel Market Trends, at 2 (Dec. 9, 2015).

⁸⁰ *Id.* at 1.

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Notably, all of the above developments post-date the Commission's last data collection in 2013. While the 2013 data reveal an extremely competitive market, the ecosystem has become even *more* competitive in the two-plus years that have passed since then – a very long time in today's marketplace. The continuously increasing competition in this space is a core fact that must guide this proceeding.

II. THE COMMISSION'S NEW REGIME MUST ACCOUNT FOR ACTUAL AND POTENTIAL COMPETITION, AND MUST NOT RE-REGULATE MSAS SUBJECT TO PRICING FLEXIBILITY

The indisputable facts regarding competitive deployment provide firm guidance as the Commission considers a forward-looking policy framework. The fantastic growth in competitive offerings and services since the Commission first instituted its pricing flexibility regime under Chairman Kennard demonstrates the success of its pro-investment framework. Indeed, the agency's commitment to deregulation in the fact of competitive deployment has had precisely the effect for which the Commission hoped: The development of a vibrantly successful, economically rational marketplace in which numerous companies look for and act on opportunities to extend their facilities-based networks to reach new customers. Under these circumstances, it would be counterintuitive and counterproductive to replace the suspended pricing flexibility regime with additional regulations. It would be especially unwise to do so just as the industry is accelerating the transition from legacy DSn facilities to next-generation Ethernet offerings.

Instead, the Commission should make clear that it will *not* back-track by rescinding relief in MSAs currently subject to pricing flexibility. Given the nearly identical deployment statistics in Phase I and Phase II MSAs, it also should award "Phase II" relief in all MSAs currently

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subject only to Phase I relief. It also must account for both actual competition – by lifting regulation where a competitor is offering the service at issue using its own facilities, third-part facilities, or UNEs – and potential competition – by lifting regulation where there are indicia of sufficient demand to warrant competitive provision of service using one or more of those means of entry.

A. There Is No Basis for Re-Regulating in Any Area Currently Subject to Phase I or Phase II Pricing Flexibility.

Although the FNPRM suggests a general deregulatory intent,⁸¹ it alludes to the prospect of ILECs being required to “revert” to price cap regulation in areas that are deemed to lack competition (or at least, a particular level of competition).⁸² Such an outcome would be troubling on several levels, and CenturyLink urges the Commission to refrain from undoing arrangements on which the industry has long relied, particularly given the extremely high levels of competitive deployment in MSAs with pricing flexibility.

In light of the intense and growing competition in this space as described above – particularly in the MSAs subject to pricing flexibility – there is no basis for the Commission to impose new mandates on ILECs where they enjoy relief today. In 2013, according to the data set collected by the Bureau, competitors had deployed high-capacity facilities in [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent of census blocks within “Phase II” MSAs, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY

⁸¹ See, e.g., 2012 *Special Access Notice*, 27 FCC Rcd at 16352 ¶ 80 (“As a general matter, however, we propose to adopt rules that will allow for the relaxation or even the elimination of price cap regulation where we find the presence of actual or potential competition sufficient to ensure that rates, terms and conditions for special access services remain just and reasonable.”).

⁸² *Id.* at 16353-54 ¶ 88.

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CONFIDENTIAL] percent of reported connections in Phase II MSAs were in census blocks in which competitors had deployed, and **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** percent of establishments in Phase II MSAs were in census blocks featuring competitive deployments.⁸³ The data for “Phase I” MSAs are virtually identical: Competitors had deployed facilities in **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** percent of census blocks with any high-capacity service, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** percent of connections were in census blocks with competitive deployment, and **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** of business establishments were in those census blocks.⁸⁴

Moreover, a competitor with facilities in a census block generally presence in a census block generally can serve other locations within the census block by constructing “laterals” – facilities linking their existing networks to new service locations. Census blocks are generally quite small. “The median area of all MSA census blocks for which competitive providers reported a special access location is 0.0197 square miles”⁸⁵ Laterals connecting points within a census block, further, are relatively inexpensive and therefore economic to deploy:

The bulk of the cost in providing service . . . lies in the deployment of the core fiber network, including the cost of rights of way for the network routes. In comparison, once a core network is in place, extending laterals requires a significantly smaller capital expenditure per unit of bandwidth, making this a relatively low-

⁸³ Econometric Analysis at Table C-PF2.

⁸⁴ *Id.* at Table C-PF1.

⁸⁵ *Id.* at 10.

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cost expansion. As a result, providers with nearby facilities impose an effective competitive constraint on ILEC special access services even if they are not yet actively serving a particular location because they can and do compete for those customers.⁸⁶

Thus, the fact that competitors have deployed to nearly all census blocks means that they pose a competitive threat to ILECs in virtually all parts of the country, for even when they have no facilities in place to serve a particular building, they often can economically construct laterals capable of doing so.

As these facts and data demonstrate beyond doubt, prevailing conditions have proven more than adequate to discipline the marketplace and prevent competitive harm. Indeed, there is no evidence that the Commission's pricing flexibility regime has undermined competition. Competitors' own actions demonstrate that they have not been harmed: In suspending the pricing flexibility triggers, the Commission stated that CLECs are free to file formal complaints challenging unlawful rates or terms in price-flex MSAs.⁸⁷ Notwithstanding this invitation, no entity has filed any such complaint. The fact that not a single carrier has availed itself of a remedy that has been available to it for years strongly signals the absence of any harm, the lawfulness of current rates and terms, and the absence of any cause to re-regulate.

To the extent the Commission nonetheless is inclined to turn back the regulatory clock, it should require a petitioning party to bear a high burden in demonstrating particular competitive

⁸⁶ *Id.*

⁸⁷ See *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd 10557, 10604 ¶ 84 (2012).

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harms that warrant the reversal.⁸⁸ A different approach – for instance, presuming that a reversion to price cap regulation is appropriate unless the relevant ILEC can show otherwise – would put ILECs in the untenable position of continually defending the regulatory status quo and their existing commercial relationships. Moreover, ILECs and their customers – including not only enterprises but also CLECs and wireless providers taking wholesale service – have relied on the presence of pricing flexibility to structure their current agreements. Indeed, over time, CenturyLink has entered into [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] pricing flexibility agreements with a diverse range of customers, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of which are currently in effect. Any claw-back of prior relief, such as re-imposition of price cap regulation, thus would result in disruption and costs for these industry participants and businesses, and not just for ILECs. The Commission should in all events avoid that outcome. If, however, it feels compelled to preserve a path toward re-regulation in specific instances, it should require a party with standing in the MSA in question to satisfy a high hurdle to demonstrate that those costs are proper and substantially outweigh whatever harms are asserted to persist absent that relief.⁸⁹

⁸⁸ See *2012 Special Access Notice*, 27 FCC Rcd at 16354 ¶ 88 (“Should the Commission require parties to prove harm, *i.e.*, that rates, terms and/or conditions are unjust and unreasonable, before changing the rules applicable to an area that where Phase I or Phase II relief has previously been granted?”).

⁸⁹ At a high level, such an approach would be comparable to that recently mandated by Congress in the cable context, by which the existing statutory test for determining the existence of “effective competition” was to be replaced by a presumption of effective competition absent a showing to the contrary. 47 U.S.C. § 543(o)(1). In implementing this directive, the Commission explained that it would alleviate burdens and allocate them in a manner consistent with the realities of the marketplace – a conclusion that also holds in the market for high-capacity transmission services. See *Amendment to the Commission’s Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574, 6584-85 ¶ 13 (2015).

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B. Any Successor to the Suspended Pricing Flexibility Triggers Must Afford Relief From Price-Cap Regulation Where Another Entity Is Providing, or Could Economically Provide, Dedicated Service in Competition With the ILEC.

Any new regime must, consistent with legal precedent and principles of sound policymaking, account for both existing competition and potential competition. The Commission therefore should make clear that its new regime will afford providers with relief in the event one or more other entities are providing, or could economically provide, the same service using its own facilities, third-party facilities, or UNEs.

1. Competitors in the Same Market Must Be Treated Alike.

Fundamental tenets of competitive analysis call for including all reasonably close substitutes in a product market.⁹⁰ Thus, Commission precedent makes plain that a market is defined to include all services that customers can and would treat as effective replacements should the price of one rise significantly. As the agency has held, “[w]hen one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.”⁹¹

⁹⁰ See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 562a (4th ed. 2015) (“Antitrust Law”) (a product market “includes (1) identical products, (2) products with such negligible physical or brand differences that buyers regard them as the same product, and (3) other products that buyers regard as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other”) (internal citations omitted).

⁹¹ *Application of EchoStar Commc’ns Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and EchoStar Commc’ns Corp. (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, 20606, ¶ 106 (2002) (citing Horizontal Merger Guidelines, issued by the U.S. Department of Justice & Federal Trade Commission §§ 1.11, 1.12 (rev’d April 8, 1997)). See also, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 25 (1980); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Sixth Report and Order, 99 FCC 2d 1020 (1985), vacated, *MCI Telecomms. Corp. v.*

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This understanding comports with that of the courts and the expert antitrust agencies. The D.C. Circuit has made plain that the Commission may not ignore intermodal alternatives in its competitive analyses.⁹² In *USTA I* the Court held that intermodal competition from cable providers must be considered before requiring ILECs to unbundle the high-frequency portion of their copper loops to requesting CLECs.⁹³ Similarly, in *USTA II* the Court noted that, with regard to loop alternatives which were “not a perfect substitute for the ILECs’ hybrid loops,” “we agree with the Commission that robust intermodal competition from cable providers . . . means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs.”⁹⁴ The DOJ/FTC Horizontal Merger Guidelines, for their part, explain that “[m]arket definition focuses solely on

FCC, 765 F.2d 1186 (D.C. Cir. 1985), *aff’d*, *MCI v. AT&T*, 512 U.S. 218 (1994); *Applications of Cellco P’ship d/b/a Verizon Wireless and Spectrum Co. LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses*, 27 FCC Rcd 10698, 10724-25 ¶ 70 (2012); *COMSAT Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083 (1998) (granting rate regulation relief because recent deployment of undersea fiber optic cables undercut satellite technical advantage in competing for international voice traffic); *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, 19444 ¶ 59 (2005) (recognizing that cable-based competition in certain wire centers justified forbearance), *aff’d*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 5665 ¶ 3 (2007) (“*AT&T/BellSouth Merger Order*”) (recognizing rapid growth of intermodal competitors such as cable-based telephony providers).

⁹² See *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (“*USTA I*”). See also *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 572-73 (D.C. Cir. 2004) (“*USTA II*”).

⁹³ *USTA I*, 290 F.3d at 428-29.

⁹⁴ *USTA II*, 359 F.3d at 582-85 (upholding the Commission’s rules concerning hybrid loops, FTTH, and line sharing on the grounds that “intermodal competition from cable ensures the persistence of substantial competition in broadband”).

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demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service."⁹⁵ Thus, at a minimum, the Commission must include in its analysis all high-capacity transmission services being marketed and purchased as alternatives to price-cap carriers' "special access" offerings – "all services that enterprise customers view as substitutable, including services used by small- and medium-sized businesses."⁹⁶

Disparate treatment of competitors undermines the intellectual foundation of fairness and predictability on which any regulatory regime must rest. It is axiomatic that similar products and services should be subject to similar obligations.⁹⁷ This fundamental precept is especially true for services that compete directly with one another or that are substitutable. As the U.S. Department of Justice ("DOJ") recognized long ago, "[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will

⁹⁵ U.S. Dep't of Justice & Fed. Trade Comm'n., *Horizontal Merger Guidelines* § 4, at 7 (Aug. 19, 2010) ("DOJ/FTC Horizontal Merger Guidelines").

⁹⁶ 2012 *Special Access Notice*, 27 FCC Rcd at 16350 ¶ 75.

⁹⁷ See, e.g., *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) ("We have . . . reminded the FCC 'of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment'" (citation omitted); *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("an agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard"); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (to justify disparate treatment, FCC "must explain its reasons and do more than enumerate factual differences, if any, between [them]; it must explain the relevance of those differences to the purposes of the Federal Communications Act"); *Primosphere Limited Partnership*, Memorandum Opinion and Order, 24 FCC Rcd 14780, 14786 ¶ 15 (2009) ("we are mindful that the disparate treatment of similarly situated parties may be regarded as inequitable depending on the circumstances").

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be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals.”⁹⁸ Likewise, the Commission has correctly recognized that the public interest will be served by eliminating unwarranted regulatory disparities and treating comparable parties alike. For instance, the Commission has held that, in light of the nondominant treatment of competitors’ enterprise broadband services, eliminating dominant carrier regulation for ILEC offerings of those services would “serve the public interest by eliminating the market distortions that asymmetrical regulation . . . causes”⁹⁹ and “promoting regulatory parity among providers of these services.”¹⁰⁰ The Commission’s recognition of the need to advance the public interest through “competitively neutral” rules echoes and reinforces its well-established policy to promote such regulatory parity.¹⁰¹ The goals of regulatory and competitive neutrality between

⁹⁸ Reply Comments of the U.S. Department of Justice, *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, at 26 n.42 (filed Sept. 28, 1990).

⁹⁹ *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12286 ¶ 49 (2008); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18730-31 ¶ 46 (2007) (“*AT&T Forbearance Order*”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19503 ¶ 45 (2007) (“*Embarq Forbearance Order*”).

¹⁰⁰ *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49; *Embarq Forbearance Order*, 22 FCC Rcd at 19504 ¶ 48.

¹⁰¹ In the context of universal service support, the Commission has said competitive neutrality means “neither unfairly advantag[ing] nor disadvantag[ing] one provider over another” in the application of Commission rules. *Federal-State Joint Bd. on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801 ¶ 47 (1997).

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similarly situated competitors cannot be met if ILECs, and ILECs alone, are saddled with wholesale access obligations that their competitors do not bear.

The principle of competitive neutrality is also enshrined in the Administrative Procedure Act,¹⁰² which requires an agency to “apply the same criteria to all [parties]”¹⁰³ “Government is at its most arbitrary when it treats similarly situated people differently.”¹⁰⁴ As the D.C. Circuit has explained, “[d]eference to agency authority or expertise . . . ‘is not a license to . . . treat like cases differently,’”¹⁰⁵ and an agency cannot “arbitrarily appl[y] different decisional criteria to similarly situated carriers.”¹⁰⁶ Similarly, the Second Circuit has emphasized that an agency cannot “‘grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday’”¹⁰⁷ Likewise,

¹⁰² 5 U.S.C. § 706(2)(A).

¹⁰³ *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985).

¹⁰⁴ *Etelson v. Office of Personnel Management*, 684 F.2d 918, 926 (D.C. Cir. 1982).

¹⁰⁵ *Airmark*, 758 F.2d at 691 (quoting *United States v. Diapulse Corp. of America*, 748 F.2d 56, 62 (2d Cir. 1984) (affirming lower court order allowing medical device to be marketed without FDA approval in light of its similarity, in all relevant respects, to a device previously approved by FDA)).

¹⁰⁶ *Id.* at 692. See also *Independent Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) (“An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.”); *id.* at 1260 (“The treatment of cases A and B, where the two cases are functionally indistinguishable, must be consistent. That is the very meaning of the arbitrary and capricious standard.”); *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 869, 872 (D.C. Cir. 1978) (agency “cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly”).

¹⁰⁷ *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), *rev’d on other grounds*, 382 U.S. 46 (1965)).

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there may not be one regime for a provider that enjoyed large market shares in years long past and another for a successful competitor operating in the same geographic and product market.

In short, then, to “minimize marketplace distortions arising from regulatory advantage,”¹⁰⁸ the Commission should eliminate price cap regulation where a competitor is providing the same service as the ILEC.¹⁰⁹

2. Potential Competition Is as Relevant as Actual Competition.

As the Commission previously acknowledged in this docket, its “analysis must take account of ... potential competition” as well as actual competition.¹¹⁰ Put differently, the agency must (as it acknowledges) conduct a “forward-looking” evaluation that accounts for prospective competition.¹¹¹ A robust competitive analysis must necessarily include scrutiny of potential and future entry into the relevant market.¹¹² In particular, firms with “readily available ‘swing’ capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market” may be considered market participants.¹¹³ Accordingly, longstanding judicial

¹⁰⁸ *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19532 ¶ 1 (2007).

¹⁰⁹ See *2012 Special Access Notice*, 27 FCC Rcd at 16352 ¶ 80.

¹¹⁰ *Id.* at 16347 ¶ 69 n.152.

¹¹¹ *Id.* at 16350 ¶ 73.

¹¹² See DOJ/FTC Horizontal Merger Guidelines § 5.1 at 15-16.

¹¹³ *Id.* § 5.1 at 16. See also Antitrust Law ¶ 423 (market includes firms that can “promptly, and without making a largely unsalvageable investment, shift into the market . . . and if their prospective output or capacity can be reasonably estimated”). For example, many competitive fiber providers build fiber rings that pass close to a building, but do not drop “laterals” to serve that building until a customer subscribes to a service. The Commission must account for this

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and Commission precedent requires consideration of the potential for entry when analyzing the competitiveness of a marketplace.¹¹⁴ Moreover, as noted above, competitors in the provision of high-capacity transmission often can economically deploy “lateral” facilities linking existing facilities to nearby service locations.¹¹⁵ Thus, DOJ has found that special access competition from traditional CLECs constrains ILEC prices in any building that is sufficiently near, but not necessarily already connected to, their competitive sunk network facilities.¹¹⁶ The Commission

potential competition, given the very limited costs the competitive provider would face in extending a lateral once its fiber passes a location.

¹¹⁴ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) (“The Commission cannot, consistent with the statute, blind itself to the availability of [network] elements outside the incumbent’s network.”); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001); *Qwest Corp. v. FCC*, 689 F.3d 1214, 1221 (10th Cir. 2012) (traditional market power framework requires consideration of “whether the potential for competitive market entry is sufficient to constrain an incumbent carrier’s ability to maintain prices above competitive levels”); *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 303 (D.C. Cir. 2009) (“the FCC has consistently considered both actual and potential competition in assessing whether a marketplace is sufficiently competitive to warrant UNE forbearance”); *Covad Commc’ns Co. v. FCC*, 450 F.3d 528, 540 (D.C. Cir. 2006) (approving unbundling order because Commission “repeatedly justifies its unbundling determinations on the basis of both actual and potential competition”); *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2586 ¶ 87 (2005) (“Triennial Review Remand Order”) (unbundling unnecessary where conditions indicate that “reasonably efficient competitive LECs are capable of duplicating the incumbent LEC’s network”), *aff’d*, *Covad Commc’ns Co. v. FCC*, 450 F.3d 258 (D.C. Cir. 2006); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3307 ¶ 68 (1995) (“[W]hether a firm possesses market power” depends in part on “conditions of entry”).

¹¹⁵ See *Econometric Analysis* at 10.

¹¹⁶ See, e.g., *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5682-83 ¶¶ 41-42 & nn.111-14, 5685 ¶ 46 (describing and adopting “screens” employed by DOJ to determine whether a building could be served by alternative facilities, which recognize that competitors with facilities near a building can and do compete for customers in that building). See also *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 910-11 (D.C. Cir. 2009) (finding that the ability of CLECs “to deploy their own facilities and thereby reduce their reliance on ILECs altogether” is a relevant factor and that the FCC “reasonably considered both the existence and the desirability of self-

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has in many cases eased regulatory restrictions or approved transactions based in part on the prospect of incipient competition.¹¹⁷ Moreover, it has recognized the propriety of inferences regarding the prospect of competitive deployment based on factors that have driven deployment in other geographic markets. For example, in reconsidering unbundling obligations imposed on incumbents, the FCC in its 2005 *Triennial Review Remand Order* established “an approach that relie[d]... on the inferences that can be drawn from one market regarding the prospects for competitive entry in another.”¹¹⁸ Those inferences were based on factors relevant here, as well – the extent of potential revenues in the geographic market under consideration, as reflected there by the number of business lines present.¹¹⁹ Here, the Commission should also consider suitable proxies for available revenues – such as the number of business establishments within a given market – and use those to effectuate a regime that properly accounts for potential competitors.

C. The Commission Should Establish a Pro-Deployment Framework to Govern DSn-Capacity Services Going Forward.

It is unclear whether the data set compiled by the Bureau has yet to be made available for review in complete and final format, as it was undergoing substantial change just over a week

deployment as factors that further supported eliminating dominant-carrier regulation on the ILECs.”)

¹¹⁷ See *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5687 ¶ 51; *SBC Communication Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, 20 FCC Rcd 18290, 18312-13 ¶ 44 (2005) (“*SBC/AT&T Merger Order*”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18455 ¶ 44 (2005).

¹¹⁸ *Triennial Review Remand Order*, 20 FCC Rcd at 2558 ¶ 43; *Covad Commc’ns Co. v. FCC*, 450 F.3d at 540-41 (upholding the Commission’s implementation of the unbundling provisions of the Act due, in part, on substantial reliance of the effect of actual and potential competition).

¹¹⁹ See *Triennial Review Remand Order*, 20 FCC Rcd at 2559 ¶ 44.

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before these comments were due. That said, the discussion above makes clear the core characteristics of any regime that might replace the suspended pricing flexibility framework. CenturyLink thus urges the Commission to commit to the following principles, to be reflected in specific rules and concrete triggers once the data set is made available in its final form:

1. ***No rescission of existing pricing flexibility relief.*** For the reasons described above, there is no basis on which the Commission could or should remove pricing flexibility grants or other regulatory relief where it has already been granted. Competitive deployment in both “Phase I” and “Phase II” jurisdictions is ubiquitous, guaranteeing competition in both the short and long term in virtually every census block.
2. ***Expansion of Phase II relief in all Phase I MSAs.*** As explained above, the competitive deployment in Phase I pricing flex MSAs matches deployment in Phase II MSAs. There is thus no reason to withhold relief in Phase I areas that has been granted in Phase II areas.
3. ***Relief from price caps where there is one or more actual competitor providing the same service in the relevant geographic unit using its own facilities, third-party facilities, or UNEs.*** As described above, there is no basis for applying disparate regulatory treatment to providers offering the same service in the same marketplace.
4. ***Relief from price caps where business density is high or there are other indicia showing that third parties could likely provision service using their own facilities, third-party facilities, or UNEs.*** Likewise, to reflect potential competition, the Commission should afford ILECs relief from price-cap regulation where there is sufficient demand to enable non-ILECs to provide service on their own.

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III. CONCLUSION

For the reasons described herein, the Commission should reject calls for expansive re-regulation of DSn- or higher-capacity facilities, and should begin to put in place a framework that will continue to promote infrastructure investment and deployment in a manner consistent with law, policy, and sound economic principles.

Respectfully submitted,

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January 28, 2016

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EXHIBIT 1

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Investigation of Certain Price Cap Local Exchange) WC Docket No. 15-247
Carrier Business Data Services Tariff Pricing Plans)

DECLARATION OF CARLA STEWART

I, Carla Stewart, hereby declare and state as follows, under penalty of perjury:

1. My name is Carla Stewart. My business address is 700 West Mineral Avenue, Littleton, CO 80120. I am employed as Vice President–Cost Management at CenturyLink. My organization selects access providers for CenturyLink’s non-ILEC affiliate, which operates across the country. This declaration addresses CenturyLink’s experience as a purchaser, not seller, of high-capacity transmission services.

2. CenturyLink selects access vendors based on a variety of factors, including rates, geographic coverage, and service quality. CenturyLink has long used a mix of ILEC and CLEC vendors. In 2014, CenturyLink launched an initiative to reduce its access costs by proactively expanding its list of access vendors, while aggressively seeking lower rates from all of them. In particular, CenturyLink pursued wholesale arrangements with cable companies to obtain Ethernet local access to commercial buildings. CenturyLink was interested in these arrangements primarily because of the cable companies’ expansive network footprints and recent dramatic expansion in the provision of Ethernet and other commercial services.

3. This alternative access initiative has been highly successful, reflecting fundamental shifts in the wholesale marketplace for enterprise broadband services. In January 2014, CenturyLink had access to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END

that is, of course, no different than the ILECs' networks. It also must be kept in mind that the five largest cable companies alone cover approximately 85 percent of the business telecom spend in the U.S. And, in any event, CenturyLink's backbone network—which is similar to that of other major CLECs—allows CenturyLink to stitch together the franchise areas of individual cable companies to offer seamless Ethernet services in locations across the country.

7. CenturyLink has found that having cable as an alternative access provider has fundamentally shifted CenturyLink's experience as both a purchaser and a provider of high-capacity transmission, especially in the context of serving multi-location businesses. For example, CenturyLink recently responded to a request for proposal of a large customer with approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] locations spread across the country. For nearly three-quarters of those locations, CenturyLink determined that it could obtain Ethernet access from a cable provider.

8. Portability is another important factor to CenturyLink as an access purchaser. In all of its access arrangements, CenturyLink seeks to negotiate portability provisions that allow it to disconnect circuits or upgrade service without incurring an early termination charge, so long as the disconnection will not result in a revenue reduction for the provider (because CenturyLink is substituting or adding other circuits from that provider). In practice, CenturyLink has found that the portability provisions in ILEC and CLEC agreements operate in a similar manner, though the specific language is somewhat different. From an administrative standpoint, the

ILEC provisions tend to be more customer-friendly because there is no need for the customer to ensure that a disconnect is "matched" with the addition of a new circuit, as long as the customer continues to meet its overall revenue or circuit-count commitment. Given the availability of these portability provisions, CenturyLink routinely opts for the longest term offered by an ILEC or CLEC—such as five years—knowing that it can disconnect the circuit before the end of the term without penalty, as long as it complies with the conditions in the agreement's portability provisions.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: January 7, 2016


Carla Stewart